COURT OF APPEALS
DECISION
DATED AND FILED

February 28, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1126-CR **Cir. Ct. No. 2010CF41**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEE YANG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed*.

Before Higginbotham, Sherman and Kloppenburg, JJ.

¶1 KLOPPENBURG, J. Lee Yang appeals from a judgment of conviction for first-degree intentional homicide, with the use of a dangerous

weapon, in violation of WIS. STAT. §§ 940.01(1)(a) and 939.63(1)(b) (2011-12).[1] Yang asserts that the circuit court erred in denying his motion to suppress an incriminating in-custody statement that Yang made to detectives without an attorney present after invoking his right to counsel. We agree with the circuit court that Yang, not the detectives, initiated further communication, and therefore affirm.

BACKGROUND

¶2 The following facts are taken from the record and the suppression hearing transcript.

¶3 On December 31, 2009, City of Milwaukee police officers arrested Yang for the shooting death of his ex-wife's boyfriend, which occurred earlier that day. After being advised of his ***Miranda***[2] rights, Yang agreed to speak with the police. During the December 31, 2009 interview, one of the officers translated from English to Hmong, and from Hmong to English. Yang answered questions but denied any involvement with the homicide. Yang did not request an attorney.

¶4 Also on December 31, 2009, City of Milwaukee police detectives Christopher Blaszak and Rodolfo Gomez executed a search warrant of Yang's residence. In addition to discovering numerous firearms and rifles, the detectives observed military documents and commendations recognizing Yang's service in

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436, 444-45 (1966).

the Vietnam War. Detective Gomez noticed a "certificate signed by numerous congressmen thanking Mr. Yang for his exemplary service."

¶5 On January 2, 2010, beginning around 10:30 a.m., Detective Gust Petropoulos interviewed Yang. Officer Hue Kong translated during the interview. Petropoulos advised Yang of his ***Miranda*** rights. Yang agreed to answer questions. The interview proceeded for "a couple hours" until Yang requested a lawyer. Upon Yang's invocation of his right to counsel, Petropoulos stopped the interview.

¶6 Later that same day, Detective Gomez attended a homicide division briefing at the beginning of his 4:00 p.m. to 12:00 a.m. shift. At that briefing, Gomez learned that Petropoulos's morning interview with Yang ended by Yang invoking his right to counsel.

¶7 At approximately 5:15 p.m., Gomez visited Yang in his cell at the city jail. Gomez testified that, being a veteran himself, he wanted to meet Yang due to his military history, because Gomez considered veterans of the Vietnam War to be heroes. According to Gomez, he wanted to check on Yang to see if he needed anything, such as food other than the jail's bologna sandwiches.

¶8 Gomez went to Yang's cell, introduced himself and explained that it was an honor to speak with Yang. Gomez observed that Yang had difficulty understanding English. Gomez showed Yang a challenge point that Gomez carries in his wallet. According to Gomez, "[a] challenge point is a coin awarded by commanders of various military units for exemplary service or performance to subordinates." After Gomez pointed to the soldier depicted on the coin, Yang stood and shook Gomez's hand, demonstrating that he understood the coin's meaning.

¶9 Yang attempted to talk about his ex-wife, but Gomez immediately raised his hand, motioning to Yang to stop speaking. Gomez told Yang that he did not want to talk about her. Gomez and Yang then discussed Yang's son, who was a Marine. Gomez shook Yang's hand, gave Yang his business card, and explained through hand signals to call him if he needed anything, such as food or water.

¶10 The conversation lasted no more than five minutes. Because Yang spoke limited English, Gomez and Yang communicated mostly through hand signals. Gomez never talked to Yang about the homicide or the investigation. Gomez told Officer Lewis Brown, the jailer on duty, that if Yang needed anything or wanted something from McDonald's, Gomez would pay for it.

¶11 Later that evening, while Brown was performing his rounds, Yang handed Gomez's business card to Brown through the cell door's food tray hole. Yang did not say anything to Brown. Brown "assumed that he wanted to speak to the detective." Brown telephoned the criminal investigation bureau.

¶12 Shortly after 10:00 p.m., Gomez learned of and returned Brown's call. Brown informed Gomez that Yang wanted to speak with him, but did not know the reason. Knowing that Yang spoke limited English, Gomez dispatched Officer Sonthana Rajaphoumi, a Hmong translator on duty. Gomez and Rajaphoumi went to Yang's cell around 10:30 p.m.

¶13 Speaking through the cell door's view port, and with Rajaphoumi translating, Gomez asked Yang if Yang had asked for him. Yang confirmed that he had. Yang stated that he wanted to speak about the allegations. Gomez then escorted Yang to an interview room in the same building.

¶14 Once in the interview room, Gomez asked Yang if he wanted to speak with Gomez. Yang confirmed that he did. Gomez left Yang in the room and sought out Detective Matthew Goldberg to assist in the interview. Gomez returned to the room with Goldberg and a recording device. Rajaphoumi translated.

¶15 The recording of the interview shows that Gomez explained to Yang that Yang had previously invoked his right to a lawyer and wanted to make sure that Yang was voluntarily talking with Gomez. Yang stated that he still wanted to talk. Gomez advised Yang of his ***Miranda*** rights. After the advisement, Yang asked whether a lawyer would be present. Gomez explained to Yang that no lawyer was present. Gomez further explained that, as previously mentioned in the advisement, Yang could stop talking, or if he wished, he could continue speaking with Gomez. Yang stated that he was willing to speak with Gomez. The interview proceeded for about two hours. During the course of the interview, Yang confessed to the shooting.

¶16 On January 5, 2010, Yang was charged with first-degree intentional homicide with the use of a dangerous weapon. Yang subsequently moved to suppress the confession. At the hearing on the motion, Detective Gomez and Officer Brown testified regarding the events on January 2, 2010. At the close of the hearing, the circuit court denied the motion to suppress. The case was tried to a jury, which found Yang guilty of the charge, and the court entered a judgment of conviction. Yang now appeals.

DISCUSSION

¶17 On appeal, Yang contends that the circuit court erred in denying his motion to suppress, asserting that the confession was obtained in violation of his

invocation of his Fifth Amendment ***Miranda*** right to counsel. Yang argues first that Detective Gomez's initial conversation with Yang was the functional equivalent of an interrogation unlawfully conducted after Yang had invoked his right to counsel, because Detective Gomez's conduct "was a ruse carefully designed to elicit incriminating statements." Second, Yang argues that, even if the initial conversation was not the functional equivalent of an interrogation, Yang's incriminating statements should still be suppressed because, contrary to the court's findings, Yang did not initiate the subsequent interrogation when he held Gomez's business card outside his cell door.

¶18 We review a circuit court's denial of a motion to suppress under a two-part standard of review: we uphold the trial court's findings of fact unless they are clearly erroneous, but review de novo whether those facts warrant suppression. ***State v. Hampton***, 2010 WI App 169, ¶23, 330 Wis. 2d 531, 793 N.W.2d 901.

¶19 Once an accused has invoked his or her right to have counsel present during a custodial interrogation, "an accused ... is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." ***Edwards v. Arizona***, 451 U.S. 477, 484-85 (1981). It is undisputed that Yang effectively invoked his ***Miranda*** right to counsel at the conclusion of the morning interrogation with Petropoulos on January 2, 2010. Therefore, the issues on appeal are whether Gomez's 5:00 p.m. visit to Yang constituted an interrogation after Yang's invocation of his right to counsel, and, if it did not, whether Yang initiated the 10:30 p.m. interrogation by handing Gomez's business card to Brown. We address each issue in turn.

A. Whether Detective Gomez's initial visit to Yang was the functional equivalent of interrogation.

¶20 The concept of "'interrogation' under ***Miranda*** refers not only to express questioning" but also its "functional equivalent." ***State v. Hambly***, 2008 WI 10, ¶46, 307 Wis. 2d 98, 745 N.W.2d 48 (quoting ***Rhode Island v. Innis***, 446 U.S. 291, 301 (1980)). The United States Supreme Court explained that "functional equivalent" means "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." ***Innis***, 446 U.S. at 301.

¶21 In ***Innis***, an armed-robbery suspect was arrested, advised of his ***Miranda*** rights, and placed in a police car. ***Innis***, 446 U.S. at 291. After the suspect invoked his right to counsel, the two officers in the police car engaged in a conversation between themselves concerning the missing weapon, stating that "there were 'a lot of handicapped children running around in this area' because a school for such children was located nearby, and 'God forbid one of them might find a weapon with shells and they might hurt themselves.'" ***Id.*** The suspect then interrupted the exchange and revealed the weapon's location. ***Id.*** The ***Innis*** court concluded that no interrogation occurred, as there was no express questioning of the accused, and nothing in the record suggested that the "respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children." ***Id.*** at 302. Because the conversation was nothing more "than a few off hand remarks," the ***Innis*** court concluded that the accused "was not subjected by the police to words or actions that the police should have known were reasonably likely to elicit an incriminating response." ***Id.*** at 303.

¶22 The Wisconsin Supreme Court has summarized the ***Innis*** test for what conduct or words constitute an interrogation, as follows: "[whether] an objective observer (with the same knowledge of the suspect as the police officer) could, on the sole basis of hearing the officer's remarks or observing the officer's conduct, conclude that the officer's conduct or words would be likely to elicit an incriminating response, that is, could reasonably have had the force of a question on the suspect." ***State v. Cunningham***, 144 Wis. 2d 272, 278-79, 423 N.W.2d 862 (1988). The test reflects "both an objective foreseeability standard and the police officer's specific knowledge of the suspect." ***Id.*** at 278. While the test is not directed at the subjective intent of the police officer, the officer's conduct or words might be an important consideration "[i]f an officer knows of a suspect's unusual susceptibility to a particular form of persuasion, and the officer's conduct or words play on that susceptibility." ***Id.*** at 279 (citing ***Innis***, 446 U.S. at 302 n.8).

¶23 For example, in ***Cunningham***, police officers executed a lawful search of Cunningham's apartment and arrested him. 144 Wis. 2d at 274-75. The officers continued their search and discovered a loaded revolver. ***Id.*** at 275. One officer showed the revolver to Cunningham, advised him where it had been found, and said to the other officer, "'[t]his was apparently what Mr. Cunningham was running into the bedroom for.'" ***Id.*** Cunningham, after seeing the revolver and hearing the comment, "stated something to the effect that it was his bedroom and that he had a right to have a gun." ***Id.*** The Wisconsin Supreme Court applied the ***Innis*** test to these facts and concluded the officer's words and conduct in presenting the revolver to the defendant were not an interrogation. ***Id.*** at 282. The ***Cunningham*** court noted the words and conduct lasted a "very short time," there was no indication that Cunningham was "unusually susceptible to the officer's words and conduct in displaying the gun," and the record did not indicate that "the

defendant was unusually disoriented or upset or that the police officer knew of any unusual susceptibility of the defendant." ***Id.***

¶24 In a more recent Wisconsin Supreme Court case, an officer arrested a defendant, who then invoked his right to counsel. ***Hambly***, 307 Wis. 2d 98, ¶9. While waiting in a squad car, the defendant told the officer that he did not understand why he was under arrest. ***Id.***, ¶10. The officer replied that on three occasions, the defendant sold cocaine to an informant cooperating with the police. ***Id.*** The defendant replied that "he did not understand what was going on" and told the officer that "he wanted to speak to him and to find out what his options were." ***Id.*** During the subsequent interview, the defendant confessed. ***Id.***, ¶12. On review, the ***Hambly*** court characterized the officer's statement to the defendant as a "matter-of-fact communication of the evidence the police possessed." ***Id.***, ¶57. The court reasoned that an objective observer would not conclude that the officer's response to the defendant, who stated that he did not understand why he was under arrest, would likely elicit an incriminating response. ***Id.***, ¶58.

¶25 Turning to the present case, Gomez's conduct was significantly more neutral and attenuated than the officers' conduct in ***Innis***, ***Cunningham***, and ***Hambly*** – all cases in which courts held that no interrogation, or its functional equivalent, had occurred. Here, Gomez did not confront Yang with incriminating physical evidence, make offhand remarks about the risks of failing to discover a weapon, or summarize facts about the State's case against Yang. Rather, Gomez's words and conduct constituted nothing more than small talk regarding military service and whether Yang needed anything, such as food or water. Gomez's initial visit lasted no more than five minutes. Gomez did not perform any express questioning, nor did he even mention the investigation or the facts leading to Yang's arrest. When Yang mentioned his ex-wife, Gomez immediately indicated

to Yang to stop talking. Based on these facts, we agree with the circuit court's conclusion that an objective observer would not conclude that such "small talk" was likely to elicit an incriminating response. *See* ***State v. Kramar***, 149 Wis. 2d 767, 789, 440 N.W.2d 317 (1989) (finding that an officer's "small talk" with the defendant about school and his family was not interrogation because it was not reasonably likely to elicit an incriminating response).

¶26 Yang argues that Gomez used his specific knowledge as to Yang's veteran status to appeal to Yang's vulnerability and therefore Gomez's visit was plainly designed by police to elicit an incriminating response from Yang. Yang's argument is not supported by the record.

¶27 Nothing in the record suggests that Yang was disoriented or upset by the topic of war service, nor does the record suggest that Gomez used Yang's war service to persuade Yang to discuss matters relating to the investigation. *See* ***Cunningham***, 144 Wis. 2d at 278 (quoting ***Innis***, 446 U.S. at 302 n.8) ("'any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response from the suspect'"). Rather, the circuit court found that Gomez credibly testified that he told Yang to contact him for "food, water or comforts," and that the small talk was not an "open invitation necessarily to simply ... contact [Gomez] if [Yang] ha[d] anything ... to say, which might be more of an open invitation to give [Gomez] a statement." We also note that Gomez's testimony that he and Yang communicated by hand signals demonstrates a significant language barrier that supports the finding that no interrogation, or its functional equivalent, occurred.

¶28 Based on the foregoing, we conclude that Gomez's initial visit to Yang at 5:00 p.m. on January 2, 2010, did not constitute an interrogation or its functional equivalent after Yang invoked his Fifth Amendment ***Miranda*** right to counsel. We turn now to Yang's assertion that he did not initiate further communication and waive his right to counsel.

B. Whether Yang initiated further interrogation and waived his right to counsel.

¶29 The test to determine whether a suspect has properly waived the right to counsel after invoking it under ***Miranda*** is as follows:

> In order to establish that a suspect has validly waived the Fifth Amendment ***Miranda*** right to counsel after effectively invoking it, the State must meet two criteria [the first of which is]:
>
> ... [T]he State has the burden to show as a preliminary matter that the suspect "initiate[d] further communication, exchanges, or conversations with the police." This criterion does not go to the validity of the suspect's purported waiver but instead is "in effect a prophylactic rule, designed to protect an accused in police custody from being badgered by police officers ...."[3]

Hambly, 307 Wis. 2d 98, ¶¶68-70 (quoting ***Edwards***, 451 U.S. at 485 and ***Oregon v. Bradshaw***, 462 U.S. 1039, 1044 (1983) (footnotes omitted)).

[3] In addition to showing that Yang initiated "further communication, exchanges, or conversations with the police," the State must also show that Yang voluntarily, knowingly, and intelligently waived his right to counsel. *See* ***Hambly***, 307 Wis. 2d 98, ¶¶69-70 (citations omitted). However, Yang did not raise this issue in his appellate brief, and thus we need not address it. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) ("an issue raised in the trial court, but not raised on appeal, is deemed abandoned"). We note that the circuit court found that the State met its burden and our review of the record supports this finding.

¶30 The United States Supreme Court, in a plurality opinion, set forth two different tests for determining whether an accused initiates further conversation with law enforcement. ***Bradshaw***, 462 U.S. at 1045-46, 1053; *see* ***Hambly***, 307 Wis. 2d 98, ¶73. The four-justice ***Bradshaw*** plurality concluded that a suspect initiates communication when he or she asks questions or makes statements "that under the totality of circumstances 'evinced a willingness and a desire for a generalized discussion about the investigation.'" ***Hambly***, 307 Wis. 2d 98, ¶73 (quoting ***Bradshaw***, 462 U.S. at 1045-46). The four-justice dissent offered a competing test: a suspect must initiate further "communication or dialogue *about the subject matter of the criminal investigation*." ***Bradshaw***, 462 U.S. at 1053 (Marshall, J., dissenting) (emphasis in original).

¶31 In ***Hambly***, the supreme court stated that it was "free to choose either the plurality's or the dissent's test [but it] need not make the choice" because its analysis would not differ under either test. 307 Wis. 2d 98, ¶75. The same is true in the present case. We conclude that, under either test, Yang initiated further communication with law enforcement.

¶32 Yang argues that his holding of the business card out his cell door did not demonstrate a willingness generally to discuss the investigation (under the ***Bradshaw*** plurality's test) nor did it constitute dialogue about the subject matter of the criminal investigation (under the ***Bradshaw*** dissent's test). We agree that by itself the physical act of holding the business card out to Brown did not constitute further communication about the investigation.[4] However, immediately upon his

[4] Rather, it could indicate that Yang wanted to speak with Gomez pursuant to their previous discussion about food, water or other comforts, though we note that Brown testified that "[u]sually when I get a card like that, I'm assuming that they want to speak to the detective."

arrival to Yang's cell, Gomez asked Yang, through an interpreter, if Yang had asked for him. Yang confirmed that he had, thereby confirming that his presentation of Gomez's card meant that he wanted to talk to Gomez. Moreover, Yang then stated that he wanted to speak about the allegations. The circuit court found Gomez's testimony to be credible regarding these events. Yang's confirmation that he wanted to speak with Gomez, along with his immediate statement about wanting to discuss the allegations, demonstrated an obvious interest and willingness to discuss the investigation and constituted dialogue about the subject matter of the criminal investigation. Therefore, these facts support the circuit court's finding that Yang initiated communication with Gomez under both ***Bradshaw*** tests.

¶33 We reject Yang's assertion that the facts in this case are analogous to those in ***State v. Conner***, 2012 WI App 105, 344 Wis. 2d 233, 821 N.W.2d 267. In ***Conner***, police officers brought Conner to an interrogation room on their apparently mistaken belief that Conner had requested to speak with them, although the record reflected that Conner had already requested counsel three times, and, after the interrogation ended, Conner never asked to resume discussions with the detectives. ***Id.***, ¶¶7, 36. Here, when Gomez appeared, Yang confirmed that he had asked for Gomez by holding out Gomez's business card and then immediately stated that he wanted to discuss the allegations. Therefore, the facts in ***Conner*** are distinguishable.

CONCLUSION

¶34 For the foregoing reasons, we conclude that the circuit court properly denied Yang's motion to suppress, because Gomez's initial visit to Yang's cell at 5:00 p.m. on January 2, 2010, did not constitute an interrogation,

and Yang initiated communication later that evening by asking for Gomez and then stating that he wanted to discuss the allegations. Therefore, we affirm the circuit court's judgment of conviction.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.